

**Office of Chief Counsel
Internal Revenue Service
memorandum**

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to: Holly L. McCann
Chief, Excise Tax Program

from: Frank Boland
Chief, Branch 7
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

subject: Oil Spill Liability Trust Fund Tax and Fuel Supplies for Aircraft Engaged in Foreign Trade

This Chief Counsel Advice responds to your request for assistance dated November 18, 2011. This advice may not be used or cited as precedent.

ISSUES

1. Does the Oil Spill Liability Trust Fund tax (OSLTF tax) imposed by § 4611 of the Internal Revenue Code (Code) apply to aviation fuel admitted into a foreign trade zone of the United States (FTZ) for warehousing and later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309?
2. Does the OSLTF tax apply to aviation fuel entered into a customs bonded warehouse and later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309?
3. If the OSLTF tax applies to the aviation fuel in Issue 1 and Issue 2, is the person that paid the tax eligible for a credit or refund of the tax on aviation fuel that is later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309?
4. If the answer to Issue 3 is yes, under what authority does the IRS have to refund the OSLTF tax?

5. If the answer to Issue 3 is yes, how and when may a taxpayer claim a credit or refund for the OSLTF tax on aviation fuel that is later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309?

CONCLUSIONS

1. The OSLTF tax applies to aviation fuel admitted into an FTZ for warehousing that is later used as supplies for aircraft actually engaged in foreign trade or certain other limited types of trade as described in 19 U.S.C. § 1309.
2. The OSLTF tax applies to aviation fuel entered into a customs bonded warehouse and later used as supplies for aircraft actually engaged in foreign trade or certain other limited types of trade as described in 19 U.S.C. § 1309.
3. The person that paid the OSLTF tax is eligible for a refund or credit of the tax for aviation fuel that is later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309.
4. Under § 6402, the IRS has the authority to refund overpayments of the OSLTF tax.
5. A taxpayer may claim a credit or refund for the OSLTF tax on aviation fuel that is later used as supplies for aircraft actually engaged in foreign trade as described in 19 U.S.C. § 1309 on the Form 720, Quarterly Excise Tax Return, in accordance with the instructions for that form. Alternatively, a taxpayer may claim a refund for the OSLTF tax on Form 8849, Claim for Refund of Excise Taxes, in accordance with the instructions for that form.

FACTS

A fuel supplier enters aviation fuel into the United States. The aviation fuel is a petroleum product and the entry is an entry described in § 4611(a)(2). Upon entry, the aviation fuel is either delivered to storage tanks that are in a customs bonded warehouse or in FTZs. All of the aviation fuel is later delivered into the fuel supply tanks of aircraft; some of these aircraft are actually engaged in foreign trade and other aircraft are engaged in domestic air transportation.

LAW AND ANALYSIS

Section 4611(a)(2) imposes a tax on petroleum products entered into the United States for consumption, use, or warehousing. Under § 4611(d)(2), the person entering the products is liable for the tax. Section 4612(a)(4) defines the term “United States” to include FTZs. The Code does not exempt from this tax petroleum products that are actually used in foreign trade.

Section 1309(a) of Title 19 U.S.C. provides that articles of foreign or domestic origin may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe, from any customs bonded warehouse, or from an FTZ, free of duty and internal revenue tax, for certain specified purposes, including for supplies (not including equipment) of aircraft registered in the United States and actually engaged in foreign trade or trade between the United States and any of its possessions, or between Hawaii and any other part of the United States or between Alaska and any other part of the United States. Section 1309(d) of Title 19 U.S.C. provides a similar rule for aircraft registered in a foreign country if the Secretary of the Treasury is advised by the Secretary of Commerce that the foreign country allows, or will allow, substantially reciprocal privileges with respect to aircraft registered in the United States.

Citgo Petroleum Corp. v. United States, 104 F. Supp. 2d 106 (CIT 2000), involves the Harbor Maintenance Tax (HMT), which is imposed by § 4461 on, among other things, the unloading of commercial cargo from a commercial vessel at a port in the United States. In this case, Importer was subject to the tax on its cargo of aviation fuel that it entered into a customs bonded warehouse in the United States. Importer later withdrew the fuel from the warehouse as supplies for aircraft actually engaged in foreign trade.

Similar to the OSLTF tax, the Code does not exempt from the HMT petroleum products that are actually used in foreign trade. However, the court found that 19 U.S.C. § 1309 applied to the facts of the case even though the activity addressed in § 1309 (the withdrawal from a customs bonded warehouse) occurred after the incidence of the HMT (the unloading of cargo at the port). Thus, Importer was allowed a refund for the HMT on the fuel actually used in foreign trade.

The IRS has the authority under § 6402 to allow a credit or make a refund of an overpayment to the person who made the overpayment. An overpayment of tax is read in its “usual sense, as meaning any payment in excess of that which is properly due Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment.” Jones v. Liberty Glass Co., 332 U.S. 524, 531 (1947).

When the aviation fuel enters into the United States and is stored in a customs bonded warehouse or admitted into an FTZ, the enterer is liable for the OSLTF tax at the time of entry. § 4611(a)(2). However, when the fuel is later withdrawn from the customs bonded warehouse or FTZ and supplied to aircraft actually engaged in foreign trade, the 19 U.S.C. § 1309 exemption from the OSLTF tax applies. See Citgo, 104 F. Supp. 2d at 106. The proper tax liability would then not include the OSLTF tax. Accordingly, the tax paid by the enterer would be in “excess of that which is properly due,” which results in an overpayment. Accordingly, we conclude that under § 6402, the Service has the authority to issue a refund of an overpayment of OSLTF taxes to the enterer.

A taxpayer may claim a credit or refund of an OSLTF tax overpayment on Form 720. Alternatively, a taxpayer may claim a refund of an OSLTF tax overpayment on Form 8849. On Form 720, the taxpayer should attach Schedule C, Claims, to Form 720, with the claim amount entered on Line 15, Other claims. If the taxpayer uses Form 8849 to claim a refund, the claim should be made by attaching Schedule 6, Other Claims, to the Form 8849.

Please call (202) 622-3130 if you have any further questions.